

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Examiner: Jeanette E. Chapman

Group Art Unit: 3633

In re application of:

PAOLO TIRAMANI

Serial No.: 10/653,523

Filed: September 2, 2003

Confirmation No. 3343

MODULAR PREFABRICATED
HOUSE

Attorney Docket No. 286357-00004-1

APPELLANT'S REPLY TO EXAMINER'S ANSWER

March 19, 2010

Commissioner for Patents
MAIL STOP APPEAL BRIEF - PATENTS
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This is in response to the Examiner's Answer, dated January 21, 2010. In the initial portion of the Answer the Examiner has repeated the rejections and associated reasoning as set forth in the Final Office Action. Appellant relies upon the arguments set forth in the Appeal Brief as a response to those rejections. The following argument relates to the Examiner's "Response to Argument" at pages 8-24 of the Answer.

REMARKS

Claims 13-15: Rejected under 35 U.S.C. § 112, second paragraph

Claims 13-15 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite. Claims 13-15 originally depended from Claim 12. Claim 12 has since been canceled. On February 24, 2009 Appellant filed a response after final that amended, *inter alia*, the dependencies of Claims 13 and 15 thereby removing this issue from a potential appeal. Appellant notes that, even if the Examiner did not enter the other amendments in

the February 24, 2009 response after final, under MPEP § 714.20(C), this specific amendment could have been entered so as to remove this issue from the Appeal.

In the Answer, the Examiner asserted that the change in the dependency of Claim 13 would not have reduced the issues for appeal. Appellant disagrees but again notes that this minor issue may be corrected at a later time, *e.g.* by an Examiner's Amendment.

Claims 1-2, 4, 9-11, and 17-18; Rejected under 35 U.S.C. § 103(a)

Claims 1-2, 4, 9-11, and 17-18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over *Kump* (U.S. Patent No. 3,712,007) in view *Donahue* (U.S. Patent No. 2,644,203).

The initial portion of the argument in the Appeal Brief noted that definitions and/or the breadth of claims were at issue. Thus, the Appellant submitted evidence in the form of an affidavit from a neutral party (a contractor with over 20 years of experience) and several technical dictionaries related to construction as to the meaning, *i.e.* how one of ordinary skill in the art, would interpret the word “stud” as used in the claims, and the associated word “post.”

The Examiner submitted no evidence to rebut the Appellant's evidence. Rather, the Examiner asserted that the interpretation used as a basis for these rejections is based upon, “ten year (*sic*) knowledge in the art and form (*sic*) the knowledge of the prior art references.” Thus, it appears that the Examiner is asserting reliance on common knowledge. Appellant notes this is the first notice that Appellant received indicating the Examiner was relying upon common knowledge. As such, Appellant has not previously had the opportunity to traverse the Examiner's assertion. Accordingly, and pursuant to MPEP §2144.03, Appellant now traverses the Examiner's factual assertion as not properly officially noticed.

Further, Appellant again notes that the word “stud” has a colloquial meaning, something akin to “any solid support in a wall,” and this seems to be the meaning upon which the Examiner relies. For example, hardware stores sell “‘stud’ finders” which are structured to detect any solid object behind a thin wall. Thus, it is “common knowledge” that studs are located in walls. Patent claims, however, are not interpreted in view of common knowledge, but must be given their broadest reasonable interpretation, “in light

of the specification as it would be interpreted *by one of ordinary skill in the art.*” *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364, 70 USPQ2d 1827 (Fed. Cir. 2004) (emphasis added).

Thus, the claims must be interpreted as *one of ordinary skill in the art* would interpret the claims. As set forth in Evidence Appendix G, for example, those *of ordinary skilled in the art* have explicit names and terminology for the rigid elements in a wall. For example, a partial support is known as a “cripple.” Appellant believes that if one were to ask a average person to use a “stud finder” to find a “cripple” in a wall, one would be more likely to receive a visit from the authorities than to have the location of a partial support identified. The point being, those skilled in the art in the field of construction use specific words to describe specific elements of a wall. Thus, when a claim is properly interpreted, as it would be interpreted *by one of ordinary skill in the art*, it is easily determined that the colloquial definition of the word “stud” used by the Examiner is not applicable.

On pages 11 and 12, the Examiner asserts that Appellant’s argument is confusing and more limited than the claims. Appellant apologizes if there is any confusion, but believes that the root of such confusion lies in the Examiner’s attempt to compare apples to oranges. That is, the present application discloses a modular house having a traditional (with the exception of the multi-frame opening recited in the claims) rigid frame. *Kump*, however, discloses a modular assembly wherein the unit has an external structural frame, a unibody module frame (a pod), and within the module frame there are framed openings for doors, windows, etc. Rather than acknowledging the differences between *Kump* and traditional frames, the Examiner asserts that the *Kump* “frames” are the equivalent to traditional frames. With this summary, Appellant has hopefully removed any confusion as to the discussion of multiple frames in *Kump* and relies upon the argument set forth in the Appeal Brief.

On page 12, the Examiner asserts that, “The claims do not recited (*sic*) a traditional frame; further what is considered in the art to be traditional frame for modules.” Appellant again notes that the claims are interpreted “in light of the *specification* as it would be interpreted *by one of ordinary skill in the art.*” Here, the specification and figures disclose a frame having generally straight, rigid members. Use

of straight rigid members, typically wood or steel, as a frame within a wall has been the most typical form of construction for over one hundred years. Appellant believes that this is actually common knowledge. That is, in the past masonry (stone) and log structures were common. While masonry structures, as well as concrete structures, are still being built, for well over one hundred years most buildings have had rigid frames made from generally straight, rigid members.

Turning to another point, the final Office Action asserted that, “Kump discloses a prefabricated house comprising: two or more modules 14, each module having a frame 11/12/42, said frame 42 **having a plurality of studs** (the horizontal and vertical portions of the frame).” Emphasis added. Thus, the Appellant provided detailed evidence as to the meaning of the words “stud” and “post” in an effort to show that *Kump*, which has a frame with twelve elements fabricated into a rectangular parallelepiped to define a structurally rigid module, only discloses the use of “posts” and not “studs.” Appellant also compared *Kump* to *Dattner* (U.S. Patent No. 3,720,022) which was cited in an earlier Office Action. *Dattner* also disclosed a parallelepiped frame. Thus, Appellant was asserting that, if the Examiner agreed that *Dattner* failed to disclose “studs” it was improper for the Examiner to now assert that *Kump* discloses “studs.” That is, the Appellant was equating *Kump* to *Dattner*.

On page 15 of the Answer, the Examiner asserts that, “Donahue was cited to show the studs between and belonging to each module not the Dattner reference;” Thus, it appears that the Examiner has relied upon *Donahue* as the only reference that discloses studs and that the Examiner no longer asserts that *Kump* discloses “studs.” Given that the discussion of “studs” vs. “posts” and *Dattner* related to *Kump*, and occurs several pages before *Donahue* is mentioned in the Appeal Brief, it is odd that the Examiner’s response to this discussion relates solely to *Donahue*. Appellant believes that the Examiner has accepted that *Kump* fails to disclose “studs.” That is, the Examiner has provided no response to rebut the Appellant’s argument that *Kump* fails to disclose “studs” and has instead merely asserted that, “Donahue was cited to show the studs between and belonging to each module” Accordingly, as the Examiner has failed to rebut Appellant’s argument, it must be accepted that *Kump* fails to disclose “studs.”

This change in the Examiner's rejection, while probably not amounting to a new rejection, still obviates much of the Appellant's argument. Moreover, as the Examiner now asserts that only *Donahue* discloses studs, the combinability of *Kump* and *Donahue* is an important issue. As set forth in the Appeal Brief, *Kump* and *Donahue* cannot be combined. That is, as noted above, *Kump* discloses a modular assembly wherein the unit has an external building frame (the structural frame), a unibody shell (the module frame), and within the module frame there are framed openings for doors, windows, etc., *i.e.* opening frames. Conversely, *Donahue* discloses a traditional wooden frame having studs disposed between posts. *See, e.g.*, element 99.

With regard to combining *Kump's* structural frame with *Donahue* studs, the Examiner has not provided an articulated reasoning indicating how or why one skilled in the art would add such stud's to *Kump's* structural frame. Appellant notes there are several problems with simply adding additional studs to *Kump's* structural frame. First, there is no indication that such studs would add any benefit to the strength of *Kump's* structural frame. Moreover, the addition of several metal studs could increase the weight of *Kump's* structural frame to the point that the structural frame is too heavy. That is, as disclosed, *Kump's* structural frame is structured to support the weight of a lightweight module and the weight of any structural frame + module(s) disposed thereabove. The inclusion of additional metal studs to *Kump's* structural frame would serve no purpose (as the modules are lightweight) and merely increase the total weight of *Kump's* structural frame. It is illogical to add studs merely to reinforce the structural frame so as to support the weight of the additional studs. Accordingly, when the "prior art reference [is] considered in its entirety, *i.e.*, as a whole, including portions that would lead away from the claimed invention," *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984), it is evident that such a combination would not be attempted by those skilled in the art.

With regard to combining *Kump's* module frame with *Donahue's* studs, Appellant has already noted that randomly adding studs to a uniframe shell would likely weaken the shell. Alternatively, if the *Donahue* studs were included as a full rigid frame disposed within the uniframe shell, *e.g.*, extending top to bottom and circumscribing the pod, such an assembly would change the principle of operation of *Kump's* module frame. As noted

in the Appeal Brief, “If the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims *prima facie* obvious. *In re Ratti*, 270 F.2d 810, 123 USPQ 349 (CCPA 1959).” Accordingly, there is no suggestion to combine *Kump*’s module frame with *Donahue*’s studs.

Finally, with regard to combining *Kump*’s opening frames with *Donahue*’s studs, such a combination is impossible. First, as noted above, simply incorporating a rigid member into a unibody frame, even at an opening frame, would likely weaken the unibody frame. Second, given that the opening frames do not extend between an upper and a lower rigid member, *i.e.* a top plate and a bottom plate, *see* Evidence Appendix Exhibit G, it is impossible to have a “stud” that is part of a frame opening.

Accordingly, as *Kump* and *Donahue* cannot be combined, and as the Examiner has withdrawn the assertion that *Kump* includes studs, the Examiner has not shown that the prior art teaches or suggests, “two or more modules, each module having a frame, said frame having a plurality of studs; said module frames having one or more multiframe openings; [and] each said multiframe opening incorporating two studs from said module frame plurality...” As such, the proposed combination is not permitted and the rejection of Claims 1, 2, 4, 9-11, and 17-18 under 35 U.S.C. § 103(a) should be reversed.

On page 15, the Examiner further restates general dictionary definitions for “stud” and “post” and asserts that, “The **lowest level** of ordinary skill in the art would appreciate Websters (*sic*) definitions.” Emphasis added. Appellant is unaware of the purported standard that claims are to be interpreted as it would be interpreted by one of “the lowest level” of ordinary skill in the art.” Appellant notes that MPEP §2141.03 discloses the factors relevant to determining the level of ordinary skill in the art. MPEP §2141.03 states, for example, that “The examiner must ascertain what would have been obvious to one of ordinary skill in the art at the time the invention was made, and not to the inventor, a judge, a layman, those skilled in remote arts, or to geniuses in the art at hand. *Environmental Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 218 USPQ 865 (Fed. Cir. 1983), cert. denied, 464 U.S. 1043 (1984).” It is noted that both the law and the MPEP consistently recite that the standard is “one of ordinary skill in the art” and not one of “the *lowest level* of ordinary skill in the art.” Accordingly, if the Examiner has an

authority to support this position, Appellant requests that the Examiner file a sur-reply for the express purpose of providing a citation.

Moreover, the Examiner's proposed rule is the exact opposite of the holding set forth in *Irdeto Access, Inc. v. Echostar Satellite Corp.*, 383 F.3d 1295, 1300, 72 USPQ2d 1678 (Fed. Cir. 2004). That is, in *Irdeto Access* the court held that, "where evidence such as expert testimony or technical dictionaries demonstrates that artisans would attach a special meaning to a claim term ... 'general-usage dictionaries are rendered irrelevant with respect to that term'" (citing *Vanderlande Indus. Nederland BV v. Int'l Trade Comm'n*, 366 F.3d 1311 (Fed. Cir 2004)). This holding comports with the holding in *Dow Chemical Co. v. Sumitomo Chemical Co., LTD*, 257 F.3d 1364, 1372 (Fed. Cir 2001), which stated that, "[w]e have previously cautioned against the use of non-scientific dictionaries, 'lest dictionary definitions be converted into technical terms of art having legal, not linguistic significance.'" (Citing *Multiform Desiccants, Inc. v. Medzam, Ltd.*, 133 F.3d 1473, 1478, 45 USPQ2d 1429, 1433 (Fed. Cir. 1998)). It is noted that neither *Irdeto Access* nor *Dow Chemical* stated that there are various "levels" of skill in the art.

The remainder of pages 15-18 of the Answer relate to the definition of the words "stud" and "post." Although, as noted above, the Examiner seemed to withdraw *Kump* as a reference that disclosed a "stud," the Examiner, on pages 15-18, seems to assert that *Kump* does disclose a "stud." In any event, Appellant believes that the specification and the technical dictionaries noted in the Appeal Brief provide a sufficient basis to determine the proper interpretation of the word "stud" as used in the claims, *i.e.*, as that word would be interpreted by one of ordinary skill in the art.

On pages 18-20, the Examiner responds to Appellant's argument regarding the Examiner's failure to present a *prima facie* case of obviousness under *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398 (2007). That is, Appellant noted that the Examiner had failed to present "an articulated reasoning" in support of the rejection and instead relied upon single conclusory sentences in each rejection. The Examiner, however, has responded to narrow points in the Appellant's argument and made an unsupported statement that reasons were articulated, but has not provided a response to the contention that a single conclusory sentence cannot be an "articulated reasoning" as required by *KSR*

International. As such, this point remains uncontested and, by omitting a response to this argument, the Examiner has admitted that a single conclusory statement is not sufficient and cannot support a *prima facie* case of obviousness. Thus, as the rejections relied upon single conclusory sentences, the Examiner has admitted that the rejection does not present a *prima facie* case of obviousness.

The Examiner, as noted, ostensibly responds to various points included in the argument relating to the requirements of a *prima facie* case of obviousness under *KSR International*. These responses, however, are generally simple statements of law or a summary of a particular case. The Examiner does not explain how or why the cited law is relevant and does not apply the law to the facts in this Appeal.

For example, on page 19 of the Answer, the Examiner states that, “Appellant appear (*sic*) to be attacking the examiner's motivation for combining references which is different and variant form (*sic*) applicants. Applicant appear (*sic*) to be suggesting that different motivations provided in the art (*sic*) rejection above are not credible because they do not arise out of the same motivation as that of applicants.” Appellant, however, has not argued that the Examiner's stated motivation for combining the references is inaccurate, but that the Examiner has not provided an articulated reasoning (with or without mentioning a motivation) as required by *KSR International*, as well as MPEP §§ 2141, 2142, and 2143.

Appellant did note that *Kump* and *Donahue* cannot be combined because the art, when viewed as a whole, teach away from each other. This, however, is not an attack on the Examiner's stated motivation(s) for combining the art as the Examiner did not provide any such motivation(s) for combining the art. Appellant merely noted that, should the Examiner choose to provide the articulated reasoning as required by *KSR International* and MPEP §§ 2141, 2142, and 2143, the Examiner should take into account the fact that the cited art cannot be combined. Thus, the Examiner's statement regarding hindsight is not relevant at this point in time.

Appellant further argued that, under *KSR International* and *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988), that “one cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention.” 837 F.2d. at 1075. This case law was cited as each rejection of Claims 1-2, 4,

9-11, and 17-18 appeared to be a list of elements followed by a statement to the effect that, because the elements are known, all combinations of those elements are obvious. Appellant further noted that this rationale is improper and is the type of rejection forbidden by *Fine*.

In response to this argument, and at page 20 of the Answer, the Examiner notes that *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971), held “that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper.” Appellant cannot fault the Examiner's summary of the holding of *McLaughlin*, but notes that the Examiner has not provided any evidence, or even any argument, that the Examiner has attempted to fulfill the requirements of *McLaughlin*. That is, the Examiner has presented no evidence or argument attempting to establish what was known to those skilled in the art or the “level of ordinary skill at the time the claimed invention was made.” In fact, and as noted above, the Examiner appears to be applying the improper standard of “the *lowest level* of ordinary skill in the art” as a basis for this rejection.

Further, the Examiner has cited *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992), in response “to appellant's argument that there is no suggestion to combine the references.” Answer at 20. Appellant, however, never asserted that there had to be a “suggestion to combine the references.” As such, while the Appellant cannot fault the Examiner's summary of the law, it is noted that this citation is also irrelevant. Similarly, the Examiner notes that it is improper to attack references individually. Again, the Examiner has provided a proper summary of the law, but the Appellant never attacked the references individually. The Appellant summarized the references individually, noted the deficiencies therein, and then provided reasons why the cited art cannot be combined or why, due to the noted deficiencies, such a combination would still not read on the claims of the present application. As before, the Examiner is not inaccurate, but merely citing law in a vacuum does not amount to a proper response.

Finally, the Examiner argues that, “The examiner has articulated his reason form (*sic*) combining references” Just to be clear, Appellant provides the entire rejection of Claim 1 below:

Claim 1.

Kump discloses a prefabricated house comprising: two or more modules 14, each module having a frame 11/12/42, said frame 42 having a plurality of studs(the horizontal and vertical portions of the frame); said module frames having one or more multi-frame openings 41 (*and those in between elements 11 and 12); each said multi-frame 41 opening incorporating two studs from said flame plurality of studs and having a plurality of medial cross-members 42/46(the medial or cross members being those in between the studs; and said two or more modules 14 structured to be joined at one of said one or more multiframe openings. See column 4, lines 1-20.

Applicant argues that the base reference does not include studs making up the openings off between modules

Donahue discloses: A prefabricated house comprising: two or more modules 10/16, each module having a frame, said frame having a plurality of studs 70, 12,95, 99, figure 2; said module frames having one or more multi-frame openings at 102/103; each said multi-frame opening incorporating two studs 70/99 from said frame plurality of studs.

In view of the above, it would have been obvious to include the modules including studs and incorporating studs from the plurality of studs in order to reinforce and strengthen the modules. See figures 1, 4 and 6

As noted in the Appeal Brief, the Examiner provides a list of elements allegedly disclosed by the cited art (the first and third paragraphs above) followed by a single conclusory sentence (the fourth paragraph above). That is, the Examiner asserts that the statement “In view of the above, it would have been obvious to include the modules including studs and incorporating studs from the plurality of studs in order to reinforce and strengthen the modules” is an “articulated reasoning.” For the reasons set forth in the Appeal Brief, Appellant disagrees.

Claims 5-6 and 14-15; Rejected under 35 U.S.C. § 103(a)

Claims 5-6 and 14-15 are rejected under 35 U.S.C. § 103(a) as being unpatentable over *Kump* (U.S. Patent No. 3,712,007) in view of *Donahue* (U.S. Patent No. 2,644,203) and further in view of *Derman* (U.S. Patent No. 2,070,924). *Derman* discloses a wardrobe or cabinet.

In the Answer, the Examiner asserts that, “Derman discloses a building industry assembly.” The Examiner does not explain how a cabinet is a “building industry assembly” and Appellant is unsure how a cabinet, which is an “assembly,” is related to the “building industry.” Accordingly, for the reasons set forth in the Appeal Brief, Appellant maintains that a cabinet in non-analogous art in relation to claims for a prefabricated house.

Claims 7-8, 16 and 19; Rejected under 35 U.S.C. § 103(a)

Claims 7-8, 16 and 19 are rejected under 35 U.S.C. § 103(a) as being unpatentable over *Kump* (U.S. Patent No. 3,712,007) in view of *Donahue* (U.S. Patent No. 2,644,203) and further in view of *Prigmore et al.* (U.S. Patent No. 4,779,514). In the rejection, the Examiner alleges that *Prigmore* discloses a “fixed space,” a phrase recited in the claims.

As set forth in *In re Paulsen*, 30 F.3d 1475, 1480, 31 USPQ2d 1671, 1674 (Fed. Cir. 1994), an inventor may define specific terms used to describe an invention, but must do so “with reasonable clarity, deliberateness, and precision” and, if done, must “set out his uncommon definition in some manner within the patent disclosure” so as to give one of ordinary skill in the art notice of the change [in meaning].” That is, the applicant may be their own lexicographer.

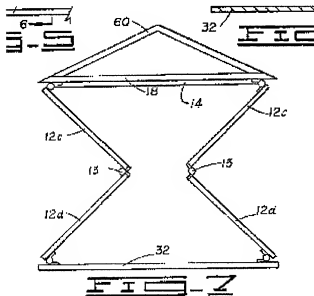
In this application, at page 8, lines 19-31, the specification states:

Fixed space is rigid and does not include foldable panels 18. Fixed space is typically any space that has functionality beyond providing volume. For example, the following would qualify as fixed space: closets, bathrooms, kitchens, storages, laundry rooms or house mechanical space, as well as corridors and stairs. Conversely, passive space is compressible space, *i.e.*, that which may be folded. Typically, the passive space is not laden with fixtures, etc.

Appellant believes that, “in some manner,” these statements set out the meaning of the phrases “fixed space” and “passive space” as used in the application. That is, the phrases are defined and examples of the types of space that fall under the definitions are given. These statements are more than sufficient to give one of ordinary skill in the art notice of the meaning of the phrases.

Based on these definitions, Appellant argued that the space of *Prigmore* identified by the Examiner is an empty roof area and that such a space does not disclose a “functionality beyond providing volume.” Thus, per the specification of the present application, *Prigmore* does not disclose a “fixed space.”

In response to this, the Examiner asserts that, “elements are clearly specified by the examiner in the rejection above.” The “rejection above” notes that, “*Prigmore et al* includes a prefabricated unit with foldable panels. One of the modules is a core having a fixed spaced portion 16/18 and a passive space portion 12/14. The fixed spaced portion having non-foldable walls and the passive space portion having foldable panels. See figure 7 of *Prigmore et al.* the foldable panels are movable from a first closed position to a second open position.” For completeness, figure 7 of *Prigmore* is shown below.



Appellant is not sure how this statement and this figure make it “clear” that area 18 discloses a “functionality beyond providing volume.” That is, area 18 is an enclosed, hollow space. An enclosed, hollow space is, in Appellant’s view, simply volume. That

is, neither the specification nor Figure 7 disclose anything but a compressible “passive space.” Accordingly, Appellant maintains that *Prigmore* fails to disclose a “fixed space” as asserted by the Examiner.

The Examiner further states that, “The claims do not recite or define any distinguishing structure for the passive and fixed space. The mere mention of the terms does not define the supposed and alleged structural elements defining the fixed and passive spaces.” Given the statements above and the well known fact that an applicant may be their own lexicographer, the Examiner’s statement is incorrect. That is, the specification defined the phrases “fixed space” and “passive space.” The applicant is not required to restate those definitions in the claim and the Examiner is not permitted to simply ignore the provided definitions. Thus, the Examiner’s response is inaccurate and therefore the Examiner has failed to rebut this argument as well.

Conclusion

It is submitted that Claims 1, 2, 4-11 and 13-19 are patentable over the prior art. Therefore, it is requested that the Board reverse the Examiner's rejections of Claims 1, 2, 4-11 and 13-19 and remand the application to the Examiner for the issuance of a Notice of Allowance.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David C. Jenkins', written over the typed name.

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